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No. 83-2032

Office - Supreme Court, U.S.
FILED
MAR 13 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

BERNARDO RIOS-PINEDA AND
ESTARNILADA RIOS-PINEDA DE RIOS

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. a. Respondents' defense of the decision below rests on an extremely restrictive, and erroneous, view of the Attorney General's discretion to rule on motions to reopen deportation proceedings. Respondents argue that the Attorney General may deny a motion to reopen in order to apply for suspension of deportation only "where it is apparent that the misconduct of the applicants will preclude their receiving the underlying relief requested" (Resp. Br. 6; see *id.* at 14-16). Respondents caution that it will not be possible to make that determination in most cases because "it is difficult to ascertain the degree of hardship without a hearing" (Resp. Br. 14; see also Pet. App. 8a n.3). Accordingly, "[w]here a case presents a fair issue of eligibility as a matter of discretion," respondents contend that the Attorney General should be required to grant the motion to reopen and hold a hearing on the availability of suspension relief (Resp. Br. 14).

The approach suggested by respondents is unduly restrictive even if one focuses exclusively on the appropriateness of granting suspension relief.[1] But its major defect is that it completely ignores the Attorney General's distinct discretion to deny motions to reopen for reasons independent of the merits of the underlying claim for relief. Respondents assert (Br. 14) that the authority to deny motions to reopen "is coextensive with the [suspension] statute itself"; thus, respondents would have the Attorney General apply the same standard to reviewing an application for suspension of deportation whether it is made in a timely fashion or in a motion to reopen long after deportation proceedings have concluded. This approach is seriously mistaken.

[1]Because respondents assert that hardship cannot be assessed without a hearing and suggest that only unusual (and undefined) circumstances would warrant denying relief if the statutory requirements for suspension are satisfied, it is clear that respondents believe that it will be the rare case in which the Attorney General would be justified in denying a motion to reopen on the ground that suspension relief will be denied. But this Court has recognized that such motions should not be granted as a matter of course. *INS* v. *Wang*, 450 U.S. 139, 143, 144 n.5 (1981). The regulatory requirement that the allegations in the motion to reopen, including those alleging hardship, be supported by affidavits is "designed to permit the Board to select for hearing only those motions reliably indicating the specific recent events that would render deportation a matter of extreme hardship." *Id.* at 143. While a hearing may be necessary in some cases to prove the *truth* of an alien's allegations of hardship, the affidavit requirement of 8 C.F.R. 3.8(a) forces the alien to detail his allegations in the motion to reopen. Thus, the Attorney General is quite capable of assessing the claimant's case from the face of the motion to reopen, without a hearing, and in many cases determining that discretionary relief is inappropriate even if the allegations of hardship are true. Indeed, given respondents' recognition (Resp. Br. 13) that the Attorney General has discretion to deny suspension relief to applicants who meet the threshold eligibility requirements, it is not apparent why his denial of respondents' motion to reopen should be invalidated even under the standard suggested by respondents.

As explained in our opening brief (at 34-36), there are strong reasons why the Attorney General should have wide latitude to deny motions to reopen deportation proceedings. See also *INS* v. *Wang*, 450 U.S. 139, 145 (1981). Therefore, it has been the Attorney General's "long-held position" that, even if the criteria for statutory eligibility have been satisfied, such motions "can be denied for purely discretionary reasons where a review of the record reflects either little likelihood of success on the merits or significant reasons for denying reopening based on the [alien's] actions." *In re Reyes*, 18 I. & N. Dec. 249, 254 (1982).

Respondents argue (Br. 15) that there is little authority supporting this power of the Attorney General to deny motions to reopen on an "independent basis * * * apart from the underlying relief sought." That contention is manifestly incorrect. This Court has recognized that the plain language of the regulation confers discretion on the Attorney General to decide when reopening is appropriate. *INS* v. *Wang*, 450 U.S. at 143-144 n.5; see also *INS* v. *Phinpathya*, No. 82-91 (Jan. 10, 1984), slip op. 5 n.6. And, of course, because the Attorney General's own regulation is the only source for the availability of the reopening procedure, his interpretation of the scope of the procedural right created by that regulation is entitled to considerable deference (see Gov't Br. 18-19). Moreover, this Court has noted that an agency's decision not to rehear or reopen a matter already decided will be reversed only for "a showing of the clearest abuse of discretion." *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535 (1946); see also *ICC* v. *City of Jersey City*, 322 U.S. 503, 514-515 (1944).[2] Thus, the

[2]Respondents' suggestion (Br. 16) that the Attorney General's exercise of discretion in denying their motion to reopen violated a due process right created by regulation is unsupportable. First, the cases cited by respondents involved sanctions for misbehavior that resulted in

interpretation of the regulation unsupported by any authority is that of respondents, which perversely requires the Attorney General to grant every motion to reopen unless he finds that the alien would not be entitled to the underlying relief.

b. The Attorney General reasonably exercised his discretion in this case in denying respondents' motion to reopen. In 1978, respondents were found deportable and ineligible for discretionary relief. They were not deported then only because they obtained an automatic stay of their deportation order by appealing it. 8 U.S.C. 1105a(a)(3); 8 C.F.R. 3.6(a). In 1982, respondents sought to reopen their deportation proceedings. Their motion did not suggest that new facts had come to light casting doubt on the correctness of the Attorney General's 1978 deportation decision. Rather, the only new circumstance was that, during the pendency of their appeals, respondents had satisfied the seven years' continuous presence prerequisite to applying for suspension of deportation.

The Attorney General was thus faced with a situation where it was apparent that respondents knew at the time of their deportation proceedings that they could in the future become eligible to apply for suspension of deportation if they could manage to delay their departure long enough. An examination of respondents' conduct showed that from the start their strategy had been to delay deportation as long

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imprisonment; this case simply involves whether completed agency proceedings should be reopened on the basis of new evidence. More important, there is no defect alleged in the *procedure* used by the Attorney General in ruling on respondents' motion to reopen. The court of appeals' objection to the decision of the Attorney General is *substantive*; the court found that the reasons given for the decision were inadequate.

as possible (see Gov't Br. 31-32),[3] and, in particular, that respondents could not reasonably have thought that the appeals that had triggered the automatic stays had any likelihood of success; instead, the appeals served no purpose other than to delay their deportation.

In these circumstances, it would have been irrational for the Attorney General to exercise his discretion to reopen the deportation proceedings. The purpose of the automatic stay provisions is to prevent deportation that would effectively eliminate the alien's right to appellate review of alleged errors in his deportation proceedings; the provision plainly is not intended to give the alien an opportunity to accrue new equities and benefits through the passage of time when there was no error in the original deportation proceedings. As detailed in our opening brief (at 29-33), granting relief to respondents would encourage misuse of the stay provisions through plainly unmeritorious appeals by holding out the promise that such action would yield substantial dividends. Nor would there be any injustice in deporting respondents, since it is not seriously disputed that they were correctly found to be deportable in 1978; indeed, by the time they filed their motion to reopen, respondents had already obtained more than three years of additional unlawful residence in this country because of the liberal stay provisions. If the Attorney General's discretion to rule on motions to reopen means anything, that discretion was not abused here. See Gov't Br. 34-36.

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[3]Even in this Court, respondents have continued to pursue this basic strategy. After the government filed its brief, respondents sought an indefinite extension of time to file their brief until the 99th Congress has an opportunity to act on immigration reform legislation that might conceivably include an amnesty program that would cover respondents. See Respondents' Motion to Continue Brief Filing Deadline (filed Feb. 9, 1985).

2. Respondents contend (Br. 19-24) that the Attorney General could not consider the unmeritorious nature of their appeals in denying the motion to reopen because those appeals were not "frivolous" within the meaning of *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 421-422 (1978). This contention is flawed both in its underlying premise and in its assessment of the facts of this case.

a. Respondents characterize the decision to deny reopening as "an extraordinary sanction" that "deprive[s] [them] of their opportunity to present their suspension application to an Immigration Judge" (Resp. Br. 19). If this characterization were accurate, it might arguably be reasonable to look to the standard set forth in *Christiansburg*, which applies to the imposition of attorney's fees against plaintiffs for instituting frivolous Title VII litigation.[4] But respondents are not being "sanctioned" here. They had an opportunity to present their suspension application to an immigration judge at the appropriate time; it was denied because they were not eligible for relief. The Attorney General did not order respondents "deported * * * forthwith" (Resp. Br. 19) as a sanction for taking unmeritorious appeals; they were correctly ordered deported (back in 1978) because they were smuggled into this country in 1974 and have never lawfully been in the United States, and, in addition, were not entitled to any discretionary relief from deportation.

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[4]Even if the Attorney General's decision were viewed as a type of sanction, the policy reasons that formed the basis for the imposition of a strict standard in *Christiansburg* are wholly absent here. Private suits are an important tool of Title VII enforcement, and Congress did not want to discourage such suits by making an attorney's fees recovery against a plaintiff readily available. See 434 U.S. at 418. Thus, the Court found that the attorney's fees provision, unless limited to frivolous or meritless litigation, "would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII" (*id.* at 422). There is no corresponding congressional policy to encourage judicial review of administrative deportation orders.

The Attorney General relied on his assessment of the merit of respondents' appeals only in considering whether equitable considerations warranted a favorable exercise of discretion to reopen their completed deportation proceedings.

Therefore, the validity of the Attorney General's decision to deny reopening should not depend upon whether the appeals were "frivolous" or "meritless" within the meaning of *Christiansburg*. As detailed in our opening brief (at 17-19, 34-36), the motion to reopen procedure is designed to be invoked in a limited number of cases where new evidence or circumstances have arisen that would make execution of the existing deportation order unjust. The facts here, where the only basis for the motion to reopen was that stays pending plainly unmeritorious appeals enabled respondents to accrue the seven years of continuous presence needed to apply for suspension of deportation, makes this a particularly clear instance for denying reopening. But it surely cannot be the case that the Attorney General's discretion to deny a motion to reopen disappears completely if the grounds for appeal are slightly stronger than "frivolous." Given the substantial incentive for aliens to use the appellate process to delay deportation, the standard must be considerably higher. When an alien seeks to reopen his deportation proceedings solely because a stay pending appeal has enabled him to accrue sufficient years of presence to apply for suspension relief, it seems eminently reasonable for the Attorney General to exercise his discretion to deny the petition unless, at a minimum, the grounds for appeal were sufficiently plausible that pursuing the appeal was a reasonable course of action because of its substantive merit, not because of its value in delaying deportation.[5]

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[5]The provisions granting automatic stays of deportation pending appeal to the BIA (8 C.F.R. 3.6(a)) and the court of appeals (8 U.S.C. 1105a(a)(3)) are extremely generous. Ordinarily, of course, a stay pending appeal requires a showing of probability of success on the merits. See 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2904,

b. In any event, respondents' appeals were "frivolous" under any reasonable definition of that term. See generally Gov't Br. 23-27. Examination of the appeals "as a whole" (Resp. Br. 20) clearly shows that they were not reasonably calculated to achieve any purpose other than delay. Respondents do not dispute that most of the contentions raised in the appeals either lacked any conceivable legal basis or were plainly unsupported by the facts. Moreover, respondents made no attempt to support their contentions by authority or argument. Thus, the appeals could not reasonably have been expected to persuade the BIA or the court of appeals that the deportation order was erroneous; they did serve the purpose of triggering the automatic stays of deportation.

Even focusing on the one contention that respondents now claim (Resp. Br. 21-23) was not frivolous — the argument that respondents could not be deported because that would constitute an unconstitutional de facto deportation of their citizen children — there is no basis for finding that the appeals were not "frivolous" or "meritless" within the meaning of *Christiansburg*. This contention had been rejected by six circuits, including the Eighth (see Gov't Br. 24 n.13). Respondents' proffered distinction (Resp. Br. 21-22) of *Mendez* v. *Major*, 340 F.2d 128 (8th Cir. 1965), is unconvincing. The holding there was that Congress is entitled to set conditions governing the right of aliens to remain in this country and that aliens can be required to leave if they do not satisfy those conditions even if a citizen child would go with them. *Id.* at 131-132. This holding completely foreclosed respondents' contention. Indeed, the

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at 316 (1973). The fact that the stay provisions of the immigration laws allow deportable aliens to prolong their unlawful presence in this country during the pendency of an appeal that has little chance of success hardly suggests that aliens should be entitled also to use that period to accrue new grounds to avoid deportation.

later case that respondents characterize (Resp. Br. 22) as finally deciding this issue actually found the claim unworthy of discussion; the court of appeals simply stated in one conclusory sentence that the claim was without merit, citing *Mendez*. See *Valadez-Salas* v. *INS*, 721 F.2d 251, 252 (8th Cir. 1983). Cf. *Hughes* v. *Rowe*, 449 U.S. 5, 15 n.13 (1980) (finding claim to be nonfrivolous and noting that seven-page opinion was written by district court in rejecting it). And even if respondents' distinction of *Mendez* had some merit, it was not argued to the court of appeals nor was any other effort made in respondents' brief to explain why the court should deviate from the established line of contrary authority. In short, respondents' appeals presented no basis on which the court of appeals reasonably could have found error in the deportation proceedings.[6]

3. With respect to the BIA's reliance on respondents' disregard of the immigration laws, respondents appear to argue (Resp. Br. 27) that the court of appeals made no broad pronouncement on whether that is a factor that may be considered. To the contrary, the court of appeals indisputably held that the BIA's reliance on Mr. Rios-Pineda's refusal to carry out an agreed-upon voluntary departure was " 'arbitrary, irrational, [and] contrary to the law' " because such conduct did not distinguish him from other

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[6]The fact that a claim has not directly been rejected by this Court does not make it nonfrivolous, as respondents appear to suggest (Resp. Br. 22). It is to be expected that many frivolous claims will never reach this Court because they will be rejected uniformly by the courts of appeals. At the same time, we do not dispute respondents' contention (Resp. Br. 22-23) that a claim raised on appeal may be nonfrivolous even if it has been rejected by several courts of appeals. In such a situation, however, the Attorney General acts reasonably in treating the appeal as taken for purposes of delay unless the appellant at least addresses the contrary decisions and offers some explanation of why his position might conceivably be correct.

illegal aliens. Pet. App. 9a (citation omitted). For the reasons stated in our opening brief (at 36-39), we believe that this action, deceitfully taking advantage of a procedure intended to mitigate the harshness of deportation, was properly considered by the BIA as weighing against granting respondents' motion to reopen.

Respondents also erroneously contend (Br. 27-28) that the Board's reliance on this factor was based on material outside the record. However, the record unequivocally demonstrates that both respondents entered the country in 1974 with the assistance of a professional smuggler (Pet. App. 27a-28a; R. 96) and that in 1978 Mr. Rios-Pineda agreed to depart voluntarily, received an extension, and then simply failed to depart as agreed (Pet. App. 28a; R. 97-98).[7] Indeed, the record shows that Mr. Rios-Pineda initially stated to the immigration judge that he would not depart if the judge granted him voluntary departure (R. 98, 102); he recanted this statement after it was explained to him that the judge could not even consider voluntary departure unless respondent stated that he would in fact depart (R. 103-104).

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

REX E. LEE
Solicitor General

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[7]Respondents are correct in noting (Br. 27) that the BIA's discussion of this point (see Pet. App. 15a) suggests that Mr. Rios-Pineda's deceit with respect to voluntary departure occurred in 1974. Given the record and the immigration judge's findings, however, it seems manifest that the BIA was in fact referring to Mr. Rios-Pineda's misconduct in 1978. Thus, the BIA did not rely on material outside the record.